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No. 82-825

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,

v.

SHELL OIL COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENT

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QUESTIONS PRESENTED

1. Whether a charge filed by a Commissioner of the Equal Employment Opportunity Commission can satisfy the oath and notice requirements regarding the "circumstances" element of Section 706(b) of Title VII of the Civil Rights Act of 1964, as amended, in the absence of any specific factual averment.

2. Whether a Commissioner of the Equal Employment Opportunity Commission can select a respondent employer as the target of a charge of discrimination under Section 706(b) on an audit basis.

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BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENT

INTEREST OF AMICUS CURIAE

With the consent of all the parties, the National Association of Manufacturers (NAM) files this brief in support of the Respondent. The NAM is a non-profit voluntary business association incorporated under the laws of the State of New York. NAM has a membership of approximately 13,000 manufacturing and related business concerns which, in the aggregate, produce an estimated 80 percent of all goods manufactured in the United States.

Our members employ a great many people and, as such, are subject to the Civil Rights Act which is enforced, in pertinent part, by the Petitioner, the Equal Employment Opportunity Commission (EEOC). NAM members believe that equal opportunity in employment is a prime objective which American industry should actively and

continually support. So too are our members generally willing to cooperate with the EEOC's reasonable attempts to enforce the law.

However, we view with some concern the Petitioner's practice of filing vague and general charges of discrimination which can lead, during the investigation of the charges, to costly and time consuming searches of corporate files. Affirmance of the decision of the lower court herein will serve to curtail the EEOC's ability to engage in time-consuming and burdensome fishing expeditions through corporate files, whereas a reversal or dilution of that decision will serve simply to perpetuate the agency's current practices. With our broad base of representation, we believe that we can present the Court with a perspective beyond that which is represented by the Respondent.

SUMMARY OF THE CASE

On September 27, 1979, Eleanor Holmes Norton, then Chairman of the Equal Employment Opportunity Commission (EEOC) filed a charge against the Shell Oil Company (Shell) alleging "across the board" discrimination at Shell's Wood River, Illinois, refinery. The charge consisted of boilerplate and conclusory allegations of discrimination. It did not allege specific discriminatory practices or instances; nor did it identify either the period during which alleged discriminatory practices were in effect nor the date of any alleged instances of discrimination.

The EEOC served Shell with a copy of the charge and a request for information on October 26, 1979. In response, Shell sought from the EEOC specific information that would support the issuance of the charge so that it could both understand its basis and be better able to respond to the request for information. The EEOC refused to provide any further information and issued an administrative subpoena to Shell for the sought-after materials.

Having exhausted its administrative remedies, Shell sought declaratory and injunctive relief in the United States District Court for the Eastern District of Missouri. On appeal from a decision in that court which enforced the subpoena of the EEOC, the Eighth Circuit held that the charge failed to provide a factual basis for itself and also failed to provide adequate notice of the date and circumstances of the alleged violations as required by Section 706(b). Later, as a result of the EEOC's petition for a rehearing, to which Shell was not permitted to respond, the Eighth Circuit modified its opinion to imply that a charge could be based on statistics developed by the EEOC. However, the court noted that, in such a case, such data should be disclosed in the charge. It was from these decisions of the Eighth Circuit that the EEOC sought review by this Court.

SUMMARY OF THE ARGUMENT

This case represents an opportunity for this Court to authoritatively eliminate the EEOC's persistent refusal to adhere to the clear mandate and intent of the 1972 amendments to the Civil Rights Act that require a commissioner to state, under oath and with specificity, the precise nature of the charges of employment discrimination that are being made against the employer. 42 U.S.C. § 2000e-5(b) (1981).

The EEOC continues to use vague and open-ended charges, often followed by date amendments, in its efforts to enforce the law. It claims that to do more would turn its charges into something akin to formal judicial proceedings, the notice requirements of Section 706(b) notwithstanding. As a result, the EEOC has ignored the intent of Congress, with the upshot being that it has opted to use its investigatory powers to conduct broad, far-reaching, virtually limitless searches of corporate files in the hope of finding some instance of discrimination that will, in the end, justify the initial charge. The

severe and unnecessary impact and costs of these regulatory forays through corporate files will be a burden for all business entities, but disproportionately so for smaller businesses and, in the end, for the public. Accordingly, the decision of the Eighth Circuit should be affirmed by this Court.

I. THE COMMISSIONER'S CHARGE HERE IS INSUFFICIENT TO MEET THE REQUIREMENTS SPECIFIED BY TITLE VII OF THE CIVIL RIGHTS ACT.

A basic underpinning of the American legal system is the principle that anyone charged with a violation of a law must be given adequate notice of the particulars of that charge. The reasons for this are based on principles embodied in the Constitution as well as concepts of fundamental fairness. Without such notification, it is impossible for the party charged to be certain of what practices must be defended and thus prepare an adequate defense.

Here, the EEOC, an agency created to investigate and conciliate charges of alleged discrimination brought by and on behalf of employees, issued, in the name of one of its commissioners, a broadly-worded boilerplate allegation of discriminatory employment practices against the Respondent. The charge did not allege specific practices or incidents; nor did it identify either the period during which the alleged discriminatory acts took place or the date of any single incident of discrimination. Rather, it stated simply that the illegal acts began on July 2, 1965—the effective date of Title VII.

In amending Title VII in 1972, Congress provided that a charge of discrimination must include the date, place, and circumstances of the unlawful employment practices. 42 U.S.C. 2000e-5(b) (1981). In the decision below, the Eighth Circuit correctly held that the charge at issue failed to provide adequate notice of the "date" and "cir-

cumstances" as required by Title VII, since a Respondent employer must, under the statute, have adequate notice of the "approximate dates of the unlawful practices" alleged, including an approximate beginning date. *Shell Oil Co. v. EEOC*, 676 F.2d 322, 325 (8th Cir. 1982). The court determined that the use of the effective date of Title VII does not satisfy the requirement of providing "notice to the employer of the parameters of the investigation." *Id.* Further, the Eighth Circuit noted that "the general nature of that data [which substantiates a charge] should be disclosed in the charge." *Id.* at 326, n.5.

We submit that a broadly worded, essentially dateless charge such as that presented here is so lacking in the basic standards of required notice that it amounts to a virtual nullity. The automatic insertion of the effective date of Title VII in a commissioner's charge is meaningless, in our view, and is not the required good-faith statement of the "dates of the alleged unlawful practices" that Section 706(b) of the Civil Rights Act contemplates. Specifically, the charge here does not allege any specific act of discrimination of any type for the entire period at issue at the Respondent's Illinois refinery. Further, employment statistics had shown that Shell's minority hiring and promotion rates exceeded the surrounding population percentage, and studies by the Office of Federal Contract Compliance had revealed that the firm was in compliance with the applicable affirmative action laws. Against this backdrop, Shell rightly made a discovery request for information concerning the bounds and bases of the allegations. These requests were refused.

A. Title VII Contains Specific Requirements for the Issuance of a Charge of Discrimination.

Perhaps because it was created to operate in the sensitive area of civil rights, the EEOC was empowered to commence an investigation of a charge of discrimination only where there is an allegation of the same by a vic-

tim, or a *valid* charge is made by a member of the Commission. *EEOC v. Appalachian Power Co.*, 568 F.2d 354, 355 (4th Cir. 1978) (per curiam). The Fourth Circuit has noted that:

> Congress sought to control mere "fishing expeditions" by requiring investigations to be preceded by the filing of a charge . . . by a Commissioner *with sufficient prior information to . . . believe* that a statutory violation has occurred. The . . . EEOC may not subpoena all evidence that "relates to any matter" [but only to that which relates to a properly filed charge]. *Graniteville Co. v. EEOC*, 438 F.2d 32, 41 (4th Cir. 1971) (emphasis supplied).

Essential to the existence of a "properly filed charge" is some indication of its temporal scope. To merely choose an arbitrary starting date and allege that the statutory violation is "continuing" does not "disclose whether the practices have occurred in the past, or at least, when they began in the past." *EEOC v. Dean Witter Co., Inc.*, 643 F.2d 1334, 1338 (9th Cir. 1980).

Under 42 U.S.C. 2000e-8(a), the EEOC is entitled only to information that is "related to unlawful employment practices . . . and is relevant to the charge under investigation." Some indication of the dates on which the alleged discriminatory acts took place is necessary to a determination of this relevancy:

> The dates of the alleged unfair practices bear directly on the relevancy of an EEOC enforcement subpoena. By disclosing the dates of the alleged practices under investigation, the EEOC will inform the charged party . . . what the proper scope of the investigation should be time-wise. *Dean Witter*, at 1338.

This notice requirement is, incidentally, entirely consistent with the EEOC's own regulations at 29 C.F.R. 1601.12(a)(3) (1981) which require that a charge include the "pertinent date" of an alleged unlawful employment practice. Further, it has been held in other

contexts that the "relevance" of a document to an agency investigation must be construed to connote something more than mere convenience; the creation of a relevance standard based on nothing more than a document's utility as a potential "road map" to the discovery of a possible wrong has been rejected. *United States v. Matras*, 487 F.2d 1271, 1275 (8th Cir. 1973).

The court below held that the Commissioner's charge was at variance with the requirements of the statute and therefore deficient. In response to the assertion that use of the effective date of Title VII as the starting date of the violation was sufficient to meet the statutory requirement, the court noted that "[t]he purpose . . . of an approximate beginning date is to protect the employer from an open-ended investigation by *limiting discovery to matters relevant* to the charge." *Shell Oil Co.*, at 325. The arbitrary utilization of the effective date of Title VII simply failed to meet this threshold test. A valid charge must thus contain a date and a statement of the circumstances "supported by some factual or statistical basis." *Id.* at 326. Such a foundation is, according to the Eighth Circuit, lacking in the charge at issue here:

> A charge which simply alleges discrimination in all areas of employment practices without some factual or statistical basis, gives the appearance of a "fishing expedition" and fails to give the employer sufficient notice [of the charges]. *Id.*

Vague and essentially dateless charges of discrimination simply do not meet the clear requirements set forth by Congress in Title VII. These requirements were written into the law to protect entities from complying with burdensome requests for potentially groundless and expensive fishing expeditions through their files. Thus, the decision of the Eighth Circuit below should be upheld if the intent of Congress is to be given its full effect.

B. Rigorous Adherence to Title VII's Requirements For the Issuance of a Commissioner's Charge is Necessary to Prevent Onerous and Burdensome Discovery Requests.

From its inception, Congress circumscribed the EEOC's powers of investigation so that they could be exercised only once a specific charge had been filed. It is important to note that this is significantly narrower than the grant of investigatory authority made to other agencies, like the Federal Trade Commission and the Wage and Hour Administration, that are authorized, for instance, to conduct investigations, inspect records, and issue subpoenas whether or not there is any complaint of wrongdoing. *See* 110 Cong. Rec. 7212, 7214 (1964). While there is little information on the precise reason for this limitation, it could be argued that it was done to prevent costly searches of confidential data which, of necessity, must be gleaned from employee personnel files. Since the nature of the EEOC's mission is the safeguarding of *individual* rights, it is likely that Congress sought in this fashion to limit the necessary revelation of confidential data on individuals absent a specific, certain, and well-documented reason therefor.

At bottom, the EEOC is seeking information from the employment files of all employees at one of the Respondent's major refineries from 1976 through 1980, and could, if desired, seek records dating back to July 2, 1965. Without adherence to the requirements of Title VII, this request for information will require an incredibly expensive, onerous, and time-consuming search. Given the vague nature of the allegations, it is quite likely that the bulk of the search will reveal nothing that is pertinent to the charge, but the point is that without the particularity required by Title VII, it is impossible for the Respondent here to know precisely what is being sought or to limit the search in any meaningful fashion.

The impact that a reversal of the holding of the court below here would have should be clear. Many smaller

and medium-sized companies would be literally forced to shut down entire personnel departments in order to comply with a request or subpoena for information based on broadly-worded and generalized charges like those at issue here.[1] It is doubtful that the Congress contemplated such a result when it passed Title VII. Further, many of these companies would be unable to seek judicial intervention to prevent the waste and spoliation of corporate resources that would be a direct result of information demands based on vague and broadly worded charges.

As such, we suggest that an efficient means of preventing this result would be the affirmation of the decision of the court below which, in turn, echoes Congress's intent that EEOC investigations, and requests for information related thereto, must be the result of a particularized complaint with clearly delineated boundaries.

II. THE REQUIREMENT THAT AN EEOC COMMISSIONER'S CHARGE MUST BE MADE UNDER OATH IMPOSES A HIGH BURDEN THAT IS NOT MET BY A MERE RECITAL OF THE ALLEGED VIOLATION.

The EEOC continues to allege that changes made to Title VII in 1972 that require a Commissioner's charge to contain a "sworn oath" of "date, place, and circumstances" of the unlawful practice is little different from its earlier "reasonable cause to believe" standard.

We respectfully disagree. An oath is a solemn undertaking requiring a good-faith belief that the facts of the charge are true. The requirement of an oath, as well as the specificity requirements contained in the 1972 amendments, have been construed to impose a higher standard

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[1] The vague and generalized charge made by the EEOC here is not unique, and has resulted in equally vague and burdensome discovery requests in *EEOC v. Dean Witter Co., Inc.*, 643 F.d 1334 (9th Cir. 1980), *EEOC v. C. A. Norgren Co.*, 535 F. Supp. 491 (D. Colo. 1982), and *EEOC v. K-Mart Corp.*, 526 F. Supp. 121 (E.D. Mich. 1981), as shown in Appendix I.

of proof on the Commission than that which existed prior to 1972. *See EEOC v. Appalachian Power Co.*, 13 FEP Cases 1294, 1295 (W.D. Va. 1976), *aff'd*, 568 F.2d 355 (4th Cir. 1978) (per curiam), where the court stated that:

> This heightened responsibility, a charge under oath replacing a charge based on reasonable belief for issuance of a commissioner's charge, certainly creates a stricter burden on the Commission (citations omitted), but that is the clear import of the language Congress placed in the Act in 1972.

The requirement of an oath, added in 1972, would be diluted by a reversal of the decision of the court below. Further, we suggest that, even under the pre-1972 language of Title VII, there was a significant congressionally imposed constraint placed upon the exercise of the EEOC's power to charge a party with a violation of the law. In referring to the old "reasonable cause to believe" standard, it was stated in a congressional colloquy that the purpose of this standard was to protect the public from an errant and arrogant bureaucracy, and that there had to be at least a reasonable cause to believe that there had been a violation before any administrative action could be taken by the EEOC.

The higher burden carried by the Commission due to the addition of the oath requirement has not gone unnoticed by the courts. In *EEOC v. Sears, Roebuck and Co.*, 490 F. Supp. 1245 (M.D. Ala. 1980), the court dismissed an EEOC action for failure to comply with this oath requirement. The court noted:

> . . . the more vague and expansive a charge filed by the EEOC is, the more strictly this Court should require the EEOC to comply with the clear wording of the statute which requires such charges to be verified by a Commissioner of the EEOC. *Id.* at 1253.[2]

[2] Where the courts have been presented with cases and issues that allow them to reexamine their prior case law on the validity of EEOC charges, almost all have modified it to recognize the new

We suggest that the oath requirement, in raising the standard of proof required of the EEOC, makes it imperative that the specific facts and circumstances that form the basis of the charge be sworn to in the mandated manner. Such is not the case here. Indeed, the charge at issue gives no facts or dates but merely and baldly asserts that the Respondent had violated the law. In our view, this does not meet a standard that requires a swearing as to the veracity of the facts alleged; it is doubtful that the charge here would be deemed sufficient under even the old "reasonable cause to believe" standard. What the Respondent here has been presented with is little more than a boilerplate recitation of the wrongs that the statute makes actionable, namely, conclusory allegations of discrimination. Such an approach to a requirement that a violation be clearly, unambiguously, and authoritatively stated and verified prior to the start of an investigation has been rejected in other contexts and should, to give meaning to the intent of Congress, be rejected here in the manner adopted by the court below. *See In re Establishment Inspection of Northwest Airlines, Inc.*, 437 F. Supp. 533 (E.D. Wisc. 1977), *aff'd*, 587 F.2d 12 (7th Cir. 1978).

CONCLUSION

Employers, large and small, are willing to abide by the letter as well as the spirit of the Civil Rights Act. They only request that their rights be honored and respected. In short, they ask only that the EEOC present them with "some evidence of the materiality of the papers demanded" in an investigation of an alleged violation of an individual's civil rights. *Federal Trade Commission v. American Tobacco Co.*, 264 U.S. 298, 306 (1924). Without an unambiguous charge and a clear demonstration of the relevancy of the agency's request

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oath and/or increased factual specificity required by the 1972 amendments to Title VIII as in the cases noted in Appendix II.

for documents and information, the EEOC should be rebuffed in its attempt to gain enforcement of an open-ended and vague subpoena which violates the spirit of the 1972 amendments to Title VII, especially when compliance therewith could unduly burden the operation of the entire business for an unknown period of time.

Accordingly, this Court should strike down the EEOC's boilerplate Commissioner's charge and related subpoena duces tecum as invalid and affirm the decision of the court below.

Respectfully submitted,

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APPENDIX I

IN *SHELL*:

Lists of: employees including their sex, race, date of hire, position and salary; applicants for hire identified by race and sex; persons who sought promotion or transfers identified by race and sex, indicating the reason for selection or nonselection; vacancies filled, indicating minimum qualifications required and identity by race and sex of persons selected; employment tests administered indicating the sex, race, and score of each person taking such test and employment action taken as a result; training programs used, positions for which they were used, and sex of participants; enumerated employment criteria used by Shell such as arrest records, credit checks, previous salary, height or weight. The subpoena also requested information regarding the existence of personnel data on computer file. (28 FEP 1088, n.2).

IN *DEAN WITTER*:

a) the types of computers, if any, used for this processing of personnel data;

b) all sort and information retrieval programs used in conjunction with such machines and manuals relating to such programs;

c) the purpose, nature and source of computer services, if any, provided under service contracts for such machines;

d) all past and present computer files containing personnel information and the contents, codes and operations relating thereto;

e) the existence and location of copies of such files and operations relating thereto;

f) the existence of *computer files used in* complying with the requirements of the *Internal Revenue*

Service, the Equal Employment Opportunity Commission, the *Securities and Exchange Commission*, the *Social Security Administration*, the *New York Stock Exchange*, and other various state and local government agencies, and operations related thereto.

IN *NORGREN*:

a. *Complete* personnel files of nearly every employee and position

b. Job applications for nearly every plant position

c. Listing of all computer programs and reports

d. Repetitious organizational charts

e. Numerous other multiple set categories of data demands (32 in all)

(Subpoena filed in District Court)

IN *K MART*:

The first subpoena requested the production of magnetic tape copies from K Mart's computer files of the following: 1) Current Payroll Master File for K-Mart International Headquarters employees; 2) the W-2 Work File for 1977, 1978, and 1979, for employees at K Mart's Troy International Headquarters and K Mart Enterprises, Inc.; 3) the Payroll Master File for 1977, 1978, and 1979 for employees at K Mart's Troy International Headquarters and K Mart Enterprises, and 4) copies of all computerized files containing any information on K Mart's Troy International Headquarters and K Mart Enterprises pensions from July 2, 1965 to October 1, 1980. The second subpoena requested that K Mart produce Robert Burnley, a K Mart executive who was responsible for maintaining K Mart's employment records for deposition (n.2, Sixth Circ. opin.)

APPENDIX II

COURT	1972 AMENDMENT INTERPRETATION CASE	PREVIOUS CASE MODIFIED	HEIGHTENED REQUIREMENT
1. Fourth Circuit	*EEOC* v. *Appalachian Power Co.*, 13 FEP Cases 1294 (D.C. Va. 1976); *aff'd.*, 16 FEP Cases 390, 568 F.2d 355 (1978)	*EEOC* v. *General Electric Co.*, 532 F.2d 359	Oath requires factual allegations; old reasonable cause affidavit insufficient.
2. Fifth Circuit	*New Orleans Public Service, Inc.* v. *Brown*, 369 F. Supp. 702, *rev'd on other grounds*, 507 F.2d 160 (5th Cir. 1975)	(No prior case on the Commissioner's charge issues)	Oath requirement and new "notice of charge" read together, requiring a detailed specification of dates, places and circumstances of alleged discriminatory acts. (369 F. Supp. at 707-8)
3. Ninth Circuit	*EEOC* v. *Dean Witter & Co.*, 643 F.2d 1234 (1980)	*Local No. 104, Sheet Metal Workers Int. Assn.* v. *EEOC*, 439 F.2d 237 (9th Cir. 1971)	Specific date requirement
4. Eighth Circuit	*Shell Oil Co.* v. *EEOC*, 522 F. Supp. 79, *rev'd*, 676 F.2d 322	*EEOC* v. *Chrysler Corp.*, 567 F.2d 754	Specific factual date and circumstances of alleged violation required to be identified in the charge; reasonable cause insufficient.
5. Seventh Circuit	*EEOC* v. *Staley Mfg. Co.*, No. 82-1855 (7th Cir. July 1, 1983)	*General Employment Enterprises, Inc.* v. *EEOC*, 448 F.2d 722 (7th Cir., 1971)	Oath requirement & examination of the date inserted to see if it was inserted *pro forma* in that case.